STATE OF MICHIGAN

COURT OF APPEALS

SHARON L. PISAPIA,

Plaintiff-Appellant,

v

551 OFFICE BUILDING, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
June 7, 2005

No. 250317
Oakland Circuit Court
LC No. 02-044424-NO

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I

On February 27, 2002, at 7:00 a.m., plaintiff slipped on ice, measuring approximately four feet by six feet, and fell as she approached the door to her place of employment. Plaintiff had always entered the building from a side door; however, per defendant's instructions, she for the first time that winter,[1] entered the building from the front door. After falling, plaintiff remained on the ground for a few minutes; she then crawled to a neighboring business and with some assistance went to her office. Approximately 10-20 minutes after she fell, plaintiff and a fellow employee returned outside to de-ice the area. Neither plaintiff nor her fellow employee fell on this occasion or experienced any difficulty in maneuvering in the area. As a result of the fall, plaintiff sustained a herniated disc, which required surgery. Plaintiff filed a negligence claim in circuit court, principally alleging that defendant failed to remove the accumulation of black ice to diminish the hazard of injury to invitees. On the basis of plaintiff's testimony indicating that she was able to avoid falling on the ice when she returned to the area, the trial court granted defendant's motion for summary disposition, reasoning that plaintiff was able to

[1] Plaintiff's testimony conflicted in this regard. She initially indicated that "a short time earlier" defendant instructed employees to use the front door and thus, she had used the front door previously. However, she also testified that it was the first time "that winter" she had used the front door.

see the ice. In this appeal, plaintiff challenges the trial court's finding that the condition she encountered was open and obvious.

II

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted).

III

Plaintiff contends the open and obvious doctrine is inapplicable to the facts of the instant case because the ice was not apparent on casual inspection. Plaintiff claims that due to the dark and hazy conditions,[2] and despite looking downward as she walked on the pathway, the patch of

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[2] Plaintiff did not allege any special aspects in her complaint. Plaintiff did not proffer any facts pertaining to "special aspects" until her deposition and her affidavit. Specifically, the complaint alleged the following:

* * *

> 5. While she was on the Defendant's premises at the exterior of the office building, the Plaintiff slipped and fell as a result of black ice that had accumulated on the walk-way near the entrance of the office building.
>
> 6. At all times herein the Defendant owed a duty of care to the plaintiff, and not withstanding said duty, committed the following negligent acts and omissions:
>
> A. Negligently, carelessly and recklessly maintaining its premises in a dangerous condition which constituted the creation of an unnatural accumulation of black ice when it was known or should have been known that such condition would cause a dangerous and unsafe condition;
>
> B. Negligently, carelessly and recklessly failed to take reasonable measures within a reasonable time after the accumulation of black ice in order to diminish the hazard of injury to invitees;

(continued…)

ice was not observable until after she fell when she was on her hands and knees. She further challenges the trial court reasoning that the ice was open and obvious because she avoided the ice *subsequent* to her fall, arguing that the conditions at the time of her fall were different than when she returned to the area later, and therefore, the trial court improperly granted defendants motion for summary disposition. We reject all of plaintiff's contentions.

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Kosmalski ex rel Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp,* 464 Mich 512, 516; 629 NW2d 384 (2001). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 609-610; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.* at 612. The open and obvious doctrine should not be viewed as some type of exception to the duty generally owed invitees, but rather, as an integral part of the definition of that duty. *Lugo, supra* at 516. Whether a danger, or in this case — unobstructed ice, is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 379 (1993); see also *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004); *O'Donnell v Garasic*, 259 Mich App 569, 574; 676 NW2d 213 (2003). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo, supra* at 517-518. But where no such special aspects exist, the "openness and obviousness should prevail in barring liability." *Id*.

The trial court correctly found there was no genuine issue of material fact that the condition of the area outside of the door and the danger it presented was open and obvious. We

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(…continued)

> C. Negligently, carelessly and recklessly failing to keep its entrance and walkway properly cleared and free from unnatural accumulation of black ice so as not to endanger those persons, including Plaintiff . . .;
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> D. Negligently, carelessly and recklessly failing to provide Plaintiff a reasonable and safe means of necessary access to its office building, free from dangerous and unnatural accumulations of black ice;
>
> E. Negligently, carelessly and recklessly failing to sand, salt or remove said ice from the entrance and walk-way, and to warn invitees of the accumulation of black ice.

find unpersuasive plaintiff's contention that the danger and risk was not apparent upon casual inspection because of there were dark and hazy conditions or because the risk involved black ice. While all accumulations of snow and ice are not open and obvious, "the open and obvious danger doctrine and principles concerning special aspects are equally applicable to cases involving the accumulation of snow and ice." *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 106, 107-108; 689 NW2d 737 (2004), citing *Mann, supra* at 333 n 13. Thus, absent special circumstances, Michigan courts have generally held that when the plaintiff knew or had reason to know of the slippery conditions, the hazards presented by unobstructed ice and snow were open and obvious and did not impose a duty on the property owner to warn of or remove the hazard. See *Perkoviq v Delcor Homes-Lakeshore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002), *Bertrand, supra* at 621; *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 4-5, 8; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

In this case, even when viewing the evidence in the light most favorable to the plaintiff, the evidence demonstrates that a reasonably prudent person with ordinary intelligence would have been able to see the unobstructed ice on casual inspection. The record established not only that plaintiff and a fellow employee returned to the area without difficulty, but also that the fellow employee had arrived and was able to enter the building without difficulty. Plaintiff offered no evidence to demonstrate that the fellow employee entered the building by alternative methods or that the conditions were different when the fellow employee entered the building through the same door without difficulty. Plaintiff's failure to see the unobstructed ice fails to create a genuine issue of fact as to whether the condition created an unreasonable risk of harm, because the test for an open and obvious danger is an objective one. *Perkoviq, supra* at 16; *Hughes v PMG Building, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). On an objective basis, the evidence demonstrates that upon casual inspection the unobstructed ice would have been seen.

Plaintiff also failed to establish any special aspects of the condition that created a unreasonable risk of harm. As we noted, *supra*, plaintiff did not plead the existence of a special aspect. Moreover, in light of plaintiff's testimony that the ice was unobstructed with no snow covering the ice, plaintiff's reliance on *Kenny, supra*, is misplaced. In that case, this Court held that a determination whether black ice *under snow* is an open and obvious condition is a question of fact for the jury. No such testimony was presented in this case. Further, plaintiff's injury notwithstanding, walking on a sidewalk does not give rise to the type of substantial risk of death or severe injury contemplated in *Lugo, supra* at 518-519.

We also find *Abke v Vandenberg*, 239 Mich App 359; 608 NW2d 73 (2000), inapplicable to the facts of this case. In *Abke*, the plaintiff fell off a loading truck bay after proceeding into a dark area of a warehouse, where only one of three lights was lit and the plaintiff could only see the defendant's silhouette. *Id*. at 362. This Court affirmed the trial court's denial of the defendant's motion for a directed verdict, concluding that the defendant's explanation, that all three lights were illuminated because they were controlled by one switch, did not account for the possibility that two of the lights may have burned out, and therefore, a dispute of material fact existed concerning the visibility of the area and whether the dark and hazy conditions testified to by the plaintiff, even if those conditions were open and obvious, created an unreasonable risk of harm under the facts presented. *Id*. at 363.

None of the conditions present in *Abke* that were sufficient to create a factual dispute as to whether the risk of harm was unreasonable are present in this case. First, plaintiff testified that it was not "pitch dark" or "nighttime," and there was no other evidence that, at the time of her fall, the lighting was so dark that plaintiff could not see her way to navigate to the door. Second, plaintiff does not allege that defendant in this case had the responsibility for maintaining the lighting in the area. Third, the defendant's presence at the time of the accident in *Abke* established constructive or actual knowledge of the risk of unreasonable harm, a circumstance notably absent in this case, discussed *infra*. Fourth, as noted in *Abke*, a question of fact existed in that case whether awareness of the truck bay eliminated the risk of falling. *Id*., citing *Hottmann v Hottmann*, 226 Mich App 171, 176; 572 NW2d 259 (1997) (observing that "the risk of falling is not eliminated by awareness of the hazard").

Alternatively, plaintiff has not established the special circumstances necessary to impose a duty to warn or remove the hazard on the part of defendant. *Corey, supra* at 4-5. Plaintiff failed to plead any facts or proffer any evidence that defendant had actual or constructive knowledge of the condition. See *Clark v Kmart*, 465 Mich 416, 419; 634 NW2d 347 (2001) (a premises possessor has a duty to warn of or diminish unsafe conditions only where the unsafe condition is known to the possessor or the condition is of such a character or has existed a sufficient length of time that the possessor should have known about it); *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001) (premises liability requires that "the possessor . . . knows, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such invitees.")

In this case, there was no evidence that defendant was on notice of the potential harm. On the morning in question, plaintiff was able to park and walk in the parking lot without incident, and plaintiff admitted that there was no snow on the ground near the door and that no precipitation had recently fallen. Thus, although she testified that she contacted defendant at 9:00 a.m. after the fall, plaintiff failed to establish that defendant had reason to know of the ice accumulation "within a reasonable time" to take "reasonable measures" to diminish the hazard of injury. *Kenny, supra* at 108, citing *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975). The trial court correctly held that defendant owed no duty to plaintiff.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer

I concur in result only.

/s/ Helene N. White